

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

76-1494

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

v.

ANTHONY M. NATELLI,

Defendant-Appellant.

B
P/S
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PEAT, MARWICK, MITCHELL & CO., AMICUS CURIAE

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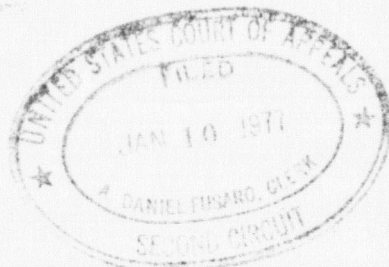
HOWARD J. KRONGARD
and

WILLIAM E. HEGARTY

MATHIAS E. MONE

GEORGE WAILAND

January 10, 1977



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BRIEF ON BEHALF OF PEAT, MARWICK, MITCHELL & CO., *AMICUS CURIAE*

This brief is submitted on behalf of Peat, Marwick, Mitchell & Co. ("Peat, Marwick") as *amicus curiae* in support of the appeal of Anthony M. Natelli from the order denying his motion for a new trial.

Mr. Natelli, who has served the prison sentence imposed upon him, seeks to clear his name and his professional honor. Peat, Marwick, the firm of which he was a member, believes in his case.

Apart from this relationship and interest, Peat, Marwick on behalf of its partners and professional staff has a direct, immediate and real interest in the resolution of the issues herein which bear directly upon the practice of the profession of accountancy.

Simply put, Mr. Natelli, an independent public accountant, was victimized by a shell game practiced by his client and a customer of the client—a shell game with only one shell on the table. The letter signed by the Manager of Special Markets of Eastern Airlines committing Eastern to the purchase of NSMC services was shown to him by NSMC. But, of course, he was not shown the side letter from the President of NSMC back to the Eastern Manager which gave Eastern the right to cancel its apparently binding purchase commitment.

This is what happened, but what happened was not put in evidence by the government at Mr. Natelli's trial to establish the alleged falsity of the commitment and the revenues, costs and income accrued therefrom in NSMC's unaudited nine-months' financial statements. Instead, to establish this fundamental element of the crime alleged the government relied upon argumentation of the prosecutor and circumstances such as Randall's reference to the Eastern commitment at the printer in the early morning hours which bore only, if at all, on the question of the suspicion with which Mr. Natelli should have viewed the commitment.

Why the government chose not to put before the jury NSMC's side letter is patent. To have done so would have been to make clear that Mr. Natelli was the victim of the fraud, not one of its participants.

There is a Kafkaesque quality to a criminal conviction for the knowing making of a false statement when the falsity of the statement was neither proven nor known or knowable. An accountant is essentially powerless to discover a conspiracy such as that between Mullen of Eastern and Randall and Kelly of NSMC. Mullen's title gave him apparent and probably actual authority to commit Eastern. The terms of his letter expressed what any

lawyer would accept as a binding commitment. If a Mullen not associated with the accountant's client but rather with a customer of the client is prepared to issue such a letter and indeed several months later to confirm again the existence of the commitment which it stated, there is no audit procedure in the world to find the lie.

The accountant's confirmation procedure assumes, as it must, that the client's customer or debtor will not against his own interest confirm the existence of an obligation or debt unless it in fact exists. If bribery will lead a faithless employee to fabricate the commitment and falsely confirm its existence, the confirmation procedure is gutted by an invisible wound.

This is in the case of an audit. But there was another turn of the screw here. Mr. Natelli was not performing an audit nor was he expressing an opinion concerning NSMC's nine-months' financial statements. His professional duty was to refrain from becoming associated with unaudited statements which he knew to be wrong. He was not expected to employ the confirmation procedure of an audit. Yet, if he had, the result would have been the same since Mullen's later confirmation at the time of the year-end audit shows that he remained steadfast in his crime.

The brief on behalf of Mr. Natelli rightly says that a conviction without proof of an essential element of the crime is a denial of substantive due process. A convicted receiver of stolen goods will receive this fundamental protection: the prosecution must have shown both the fact of theft and the guilty knowledge of the receiver.

We submit that the professional—the accountant, the lawyer—whose professional services may relate him to the statements of his client—the stolen goods of the analogy—deserves no less. Prosecutorial rhetoric may not

be accepted as a substitute for proof of falsity of the client's statement, particularly if the proof withheld would demonstrate the very fraud practiced upon the accused professional.

Dated: New York, New York
January 10, 1977

Respectfully submitted,

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----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this
action.

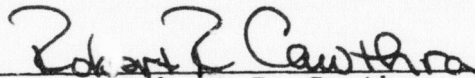
2. On the 10th day of January, 1977, I served the
annexed Brief on Behalf of Peat, Marwick, Mitchell & Co., upon:

Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

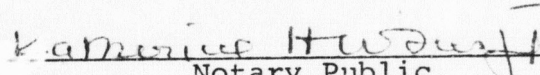
The Hon. Robert B. Fiske, Esq.
U.S. Attorney
One St. Andrews Plaza
New York, New York 10005

by depositing two true copies thereof in the Post Office maintained
by the United States Postal Service at 73 Pine Street, New York

New York 10005, enclosed in stamped, sealed envelopes addressed to the above-mentioned attorneys at the above-mentioned addresses.


Robert R. Cawthra

Sworn to before me this
10th day of January, 1977


Notary Public

KATHERINE H. W. SWIFT
Notary Public, State of New York
No. 31-9268000
Certificate filed in New York County
Commission expires March 30, 1978